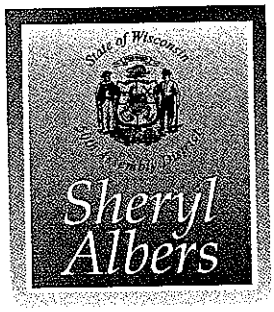

Testimony of Rep. Sheryl Albers
AB 309 Custody Studies
Senate Committee on Judiciary, Corrections and Housing
February 14, 2008

Chairman Taylor and Committee Members, Thank you for holding a public hearing on Assembly Bill 309 relating to offering and admitting custody studies in accordance with the rules of evidence.

Under current law, in an action affecting the family where a minor child is involved, the court may order a legal custody and physical placement study to be conducted by the family court counseling services or an entity chosen by the family court counseling services. The court may order an investigation of:

(1) Conditions of the child's home
(2) Each party's performance of parental duties and responsibilities
(3) Whether either party as engaged in inter-spousal battery.
(4) Any other matter relevant to the best interest of the court.

The subsequent results shall be submitted to the court. The court is required to make the results known to the parties and shall make the report a part of the record, unless the court orders otherwise.

The concern that prompted this bill is that there is no requirement under current law that the person or entity completing the investigation appear in court to explain the results, to explain how and why recommendations were

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made. If the information contained in the reports is erroneous, there is no procedure now in place to challenge statements therein contained. AB 309 creates such a procedure.

Assembly Bill 309 amends current law to require that the results of the investigation be offered and received in accordance with the rules of evidence. Under this bill, an explanation of the recommendations would be heard by the court. The individual who prepared the report would appear and be subject to questioning. Current law is otherwise retained, allowing the court to then decide whether to make the entire report, or a portion of the report, a part of the record.

You will hear from legal experts today who will provide more detail supporting the need for AB 309. I have worked with Legal Action of Wisconsin and the Wisconsin Coalition against Domestic Violence to put forth this legislation. I hope that you will agree it is an important and necessary change to current law given the impact of such reports on child placement.

AB 309 passed the Assembly Committee on Children and Families unanimously and then it passed the Assembly on a bi-partisan vote as well.

Thank you for holding a hearing on AB 309; I'll be happy to answer any questions.

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TO: Senate Committee on Judiciary, Corrections and Housing

FROM: Bob Andersen Bob Andersen

RE: Assembly Bill 309, relating to: offering and admitting custody studies in accordance with the rules of evidence.

DATE: February 14, 2008

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. Family Law is one of the three major priority areas of law for our delivery of legal services (the other two are public benefits and housing).

This bill passed the Assembly Committee on Children and Family Law 8-0 and the Assembly on January 15 on a unanimous vote. The substitute is strongly supported by a wide range of diverse groups that get involved in family law, ranging from fathers' rights organizations to the Wisconsin Coalition Against Domestic Violence to the State Bar to ourselves

This is a very important bill that relates to the vitally important interests that mothers and fathers have to the physical placement and legal custody of their children in family law actions. Incredibly enough, under current law, judges or court commissioners receive and view recommendations on these profoundly important matters before a hearing is held on the matters and without guaranteeing the parties an opportunity to question the people who make the recommendations. The recommendations come from family court services or entities that they contract with.

Those recommendations relate to the conditions of the child's home, each party's performance of parental duties and responsibilities relating to the child; whether either party has engaged in interspousal battery or domestic abuse; and the whole list of factors under s. 767.41 (5) that must be considered, including the wishes of the child, the wishes of the parents, the relationship of the parents to the child, child care, adjustment to school, alcohol or drug abuse by a parent, child abuse, and a wide range of other factors.

Substitute amendment 2 to AB 309 corrects this error under current law by simply requiring that the recommendations that are made be introduced in accordance with the rules of

evidence, as is the case in any other civil action, so that the person who made the recommendations may be questioned at the hearing. The parties are to be given a copy of the recommendations in advance to prepare for the hearing and the judge or court commissioner may not see the recommendations before they are introduced, so that the judge or court commissioner is not prejudiced beforehand.

1. **Under Current Law, Recommendations Regarding Legal Custody and Physical Placement in Family Law Actions May Be Automatically Incorporated in the Record, Without Giving Either of the Parties the Opportunity to Question How Those Recommendations Came About.**

Current s. 767.405 (14)(a) and (b) provide as follows:

(14) Legal custody and physical placement study.

(a) ***A county or 2 or more contiguous counties shall provide legal custody and physical placement study services***. The county or counties may elect to provide these services by any of the means set forth in sub. (3) with respect to mediation. Regardless of whether a county so elects, whenever legal custody or physical placement of a minor child is contested and mediation under this section is not used or does not result in agreement between the parties, or at any other time the court considers it appropriate, ***the court may order a person or entity designated by the county to investigate the following matters relating to the parties:***

1. The conditions of the child's home.

2. Each party's performance of parental duties and responsibilities relating to the child.

3. Whether either party has engaged in interspousal battery, as described in s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

4. Any other matter relevant to the best interest of the child.

(b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit the results to the court. The court shall make the results available to both parties. The report shall be a part of the record in the action unless the court orders otherwise.

Under par. (b), the results of the investigation are to be submitted to the court. There is no provision for the parties to question the person who conducted the investigation or made the report. The court can automatically make this report a part of the record.

2. **Assembly Substitute Amendment 2 to AB 309 Would Amend Paragraph (14)(b) to Require that the Report be Given to the Parties 10 days in Advance, to Require that the Investigator Who Made the Report Introduce the Report in Evidence, and to Allow the Parties to Question the Investigator About the Contents of the Report.**

The substitute amendment would change the law to read as follows:

767.405 (14) (b) The person or entity investigating the parties under par. (a) shall complete the investigation and submit a report of the results both parties at least 10 days before the report is introduced into evidence. The report shall be offered and received in accordance with the rules of evidence. The report may not be submitted to the court before it is introduced into evidence

The substitute amendment achieves three very important reforms:

- It requires that the report be introduced in accordance with the rules of evidence, which means that the person who conducted the report must appear in court to explain how the recommendations were arrived at and the parties are given the opportunity to question the person.

- It requires that the parties be given the report 10 days in advance, so that the parties have time to examine the basis for the recommendations and to obtain evidence that is relevant to those recommendations.

- It prohibits giving the report to the court in advance of its being introduced as evidence, so as to guard against the possibility that the court could be influenced by the report before it is officially introduced in evidence. [Under current law, the report is automatically provided to the court before the hearing and the court may look at it even before the hearing is held.]

3. **The Custody and Placement Studies are Conducted by a Family Court Services Office or by Any Person or Public or Private Entity Contracted with by the Director of Family Court Services**

Under s. 767.405 (14) (a), the custody and placement studies may be performed by the entities described above, as is the case for mediation. Each county – or two or more contiguous counties – appoints a Director of Family Court Services. A person who conducted mediation may not engage in the custody and placement investigation under this section, "unless each party personally so consents by written stipulation after mediation has ended and after receiving notice from the person who provided mediation that consent waives the inadmissibility of communications in mediation under s. 904.085.

4. **The Interests at Stake for the Parties are Profound – as The Recommendations of**

the Studies Can Influence or Determine Who Will Have Legal Custody and Who Will Have Physical Placement for What Period of Time.

The definitions of legal custody and physical placement show how profound those interests are. They highlight the importance of the recommendations that are being made.

Under 767.001(2), "Legal custody" means:

> (a) With respect to any person granted legal custody of a child, other than a county agency or a licensed child welfare agency under par. (b), the right and responsibility to make ***major decisions*** concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order.

Under 767.001(2m) "Major decisions" means

> (2m) ***"Major decisions"*** includes, ***but is not limited to***, decisions regarding ***consent to marry, consent to enter military service, consent to obtain a motor vehicle operator's license, authorization for non emergency health care and choice of school and religion***.

Under 767.001(5) "Physical Placement" means

> (5) ***"Physical placement***" means the condition under which a party has the ***right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care,*** consistent with major decisions made by a person having legal custody.

Legal custody and physical placement can be sole or joint or shared in any manner of ways.

5. The Investigation Required by the Statute is All-Encompassing

Under the statute, the entity is to investigate all of the following in investigating the parties. These are significant matters.

- ***The conditions of the child's home.***
- ***Each party's performance of parental duties and responsibilities relating to the child.***
- ***Whether either party has engaged in interspousal battery, as described in s.***

940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12 (1) (am).

- ***Any other matter relevant to the best interest of the child.***

This covers the gamut of circumstances that involve the parents' lives and the lives of their children.

In addition, under s. 767.41 (5), all of the following factors have to be taken into consideration in awarding legal custody and physical placement, so the entity doing the custody and placement investigation will be involved in a broad investigation.

- The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
- The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
- The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
- The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
- The child's adjustment to the home, school, religion and community.
- The age of the child and the child's developmental and educational needs at different ages.
- Whether the mental or physical health of a party, minor child, or other person living in a proposed custodial household negatively affects the child's intellectual, physical, or emotional well-being.
- The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.
- The availability of public or private child care services.
- The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the

other party.

- Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.

- Whether there is evidence that a party engaged in abuse, as defined in s. 813.122 (1) (a), of the child, as defined in s. 48.02 (2).

- Whether any of the following has a criminal record and whether there is evidence that any of the following has engaged in abuse, as defined in s. 813.122 (1) (a), of the child or any other child or neglected the child or any other child:

  a. A person with whom a parent of the child has a dating relationship, as defined in s. 813.12 (1) (ag).

  b. A person who resides, has resided, or will reside regularly or intermittently in a proposed custodial household.

- Whether there is evidence of interspousal battery as described under s. 940.19 or 940.20 (1m) or domestic abuse as defined in s. 813.12 (1) (am).

- Whether either party has or had a significant problem with alcohol or drug abuse.

- The reports of appropriate professionals if admitted into evidence.

- Such other factors as the court may in each individual case determine to be relevant.

6. **Assembly Substitute Amendment 2 to AB 309 Would Require that the Person Who Conducted the Investigation Offer the Report as Evidence So that the Person Could be Questioned About How the Recommendations Were Arrived At.**

The person who conducts the investigation will be contacting people and examining court records to assess what recommendations should be made regarding legal custody and physical placement. The person will be looking at the list of factors that appear above, under section 767.41 (5).

As a result, the investigator will be talking to the parents, children, relatives, neighbors, friends, teachers, clergy, psychologists, doctors, probation officers and any other people,

in order to make a recommendation about what is best for the children, what is best for their well-being and what is best for their adjustment.

The investigator becomes an expert witness who is basing an opinion or inference on facts or data made known to the investigator at or before the hearing. If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be separately admissible as evidence. Wis. Stat. 907.03. This means that the investigator can rely on the information the investigator received from third parties or from documents, without requiring the third parties to appear in court or the documents being separately authenticated.

The parties in turn will be able to question the investigator about:

- the protocol followed by the investigator, as compared with the usual protocol used in a particular case
- the information received from 3rd parties which formed the basis for the recommendations being made
- documents which were involved in the process, such as a domestic abuse restraining order
- the training that the investigator has in assessing factors that are listed in the statutes
- and information which the investigator may not have received

7. **By Receiving the Report 10 Days in Advance, the Parties Will be Able to Assess the Recommendations that are Made, Assess the Evidence Upon Which Those Recommendations are Made, and Prepare Evidence that May be Submitted to Challenge Some of Those Recommendations and Matters of Evidence.**

8. **These are Profound Interests for Parents that Will be Affected by Judgements and Orders that Are Not Easily Undone.**

These are profound interests for parents. Without any question being given to these recommendations, the court may simply incorporate the recommendations into the record. Those recommendations will likely result in orders and judgments being entered to enforce the recommendations. Once judgements or orders are entered, they are difficult to undo at a later stage.

Under s. 767.451, legal custody and physical placement orders may not be revised within two years after they are initially entered, unless a party can show by substantial evidence that a modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.

After two years, these same orders may not be modified unless there is a change in

circumstances that is substantial enough to overcome a presumption that favors the current allocation of custody and placement – in the best interest of the children. A change in economic circumstances or marital status of either party is not sufficient to meet the standards for modification.

In the end, the safeguards proposed by AB 309 are just a matter of simple fairness.

Memo

To: Members of the Senate Committee on Judiciary, Corrections & Housing

From: Josh Freker, Policy Director, WCADV, 608-255-0539, joshf@wcadv.org

Date: February 14, 2008

Re: Testimony in support of AB 309

Thank you for providing an opportunity to submit testimony today in support of AB 309, and thank you to Rep. Albers for sponsoring this legislation. I represent the Wisconsin Coalition Against Domestic Violence, the statewide voice for victims of domestic violence and the local programs in every county of our state that serve them.

Each year thousands of domestic violence victims in Wisconsin make the decision to break out of abusive relationships and achieve safety for themselves and their children. Over the years, the Wisconsin Legislature has passed a number of laws to acknowledge that families in which domestic violence occurs have unique concerns when it comes to questions of family law. In 2003, we passed Act 130, which said that it is the responsibility of Guardians Ad Litem to inform courts if domestic violence has occurred in the family. This was one of the most significant reforms our Legislature has made to help courts understand the dynamics of domestic violence in custody disputes and its impact on children.

However, since that time the experience statewide is that Guardians Ad Litem are not investigating or don't know how to properly assess for domestic violence. This means courts are not getting accurate information about domestic violence and how it impacts particular families. Our advocates across the state are seeing case after case in which Guardians Ad Litem misunderstand the dynamics of families or rely on inaccurate, inappropriate, or unscientific studies or labels in conducting their assessments of what's in the best interest of a child. WCADV supports AB 309 because it will help ensure that custody studies are treated by courts with a level of consistency and scrutiny across the state—and will therefore hopefully be held to a higher standard of thoroughness and accuracy. In setting clearer expectations, AB 309 will be helpful to the courts and both parties.

WCADV also supports the bill because it will require that custody studies or reports be submitted to the parties in advance of being submitted to the court. This will give parties necessary time to review and contest findings—and better educate the court about the facts of their situation. This is especially important in situations in which Guardians Ad Litem fail to properly investigate domestic violence and its traumatic impact on children who witness it in their home.

Thank you for your time and for the opportunity to submit testimony. If you have questions, please feel free to contact me at 608.255.0539 or joshf@wcadv.org.